88-1013

Supreme Court, U.S.
FILED
DEC 19 1988
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

No. 88-

RAYMOND DE LEO and ANNA A. DE LEO,
Appellants,

v.

ANTHONY A. NUNES, INC., and SALLY APPLETON,
Appellees.

ON APPEAL FROM THE SUPREME COURT OF THE
STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

JURISDICTIONAL STATEMENT

GERARD MCG. DECELLES
355 Thayer Street
Providence, RI 02906
(401) 421-7707

Co-Counsel for Appellants

KENNETH LAURENCE*
MICHAEL HALLEY
THOMAS FRISARDI
Choate, Hall & Stewart
Exchange Place
53 State Street
Boston, Massachusetts 02109
(617) 227-5020

Co-Counsel for Appellants

*Counsel of Record

December 19, 1988

QUESTIONS PRESENTED

The appealable[1] question presented is:

1. Whether a state's highest court can, consistent with the Due Process clause of the Fourteenth Amendment to the United States Constitution, apply an appellate procedural rule in a novel and arbitrary manner to affirm a state tort judgment sounding in slander for compensatory and punitive damages against an active participant in a robust environmental debate on the basis of

---

1/ Appellants are here presenting an appealable issue -- the unconstitutionality of a state appellate procedural rule having the force and effect of statute as applied to them -- together with other denials of federal right whether or not capable in themselves of being brought here on appeal. Since the appealable issue is presented together and is factually intertwined with the non-appealable issues, and since the effect of both the appealable and non-appealable denials of federal right in this case is one and the same -- to chill robust debate on matters of utmost environmental concern -- DeLeo respectfully asks this Court to consider the non-appealable issues together with the merits of the appealable issue. Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 487 n.14 (1975). DeLeo further requests that, should this Court find jurisdiction lacking for any reason under 28 U.S.C. §1257(2), the Court consider this appeal as a petition for certiorari pursuant to 28 U.S.C. §2103.

statements of law he uttered without determining whether those statements of law were true?

The additional questions presented include:

2. Whether a state's highest court can, consistent with the Due Process clause of the Fourteenth Amendment, apply an appellate procedural rule and estoppel theory in a novel and arbitrary manner to affirm a state court tort judgment sounding in slander for compensatory and punitive damages against an active participant in a robust environmental debate on the basis of statements of law he uttered without determining whether the statements uttered were true, reasonable or without actual malice?

3. Whether an active participant in a robust environmental debate can, consistent with the First Amendment to the United States Constitution as applied to the states through the Fourteenth Amendment, be held

liable for compensatory and punitive damages sounding in slander under state tort law for having made true, reasonable or not knowingly false statements of law?

TABLE OF CONTENTS

	PAGE
QUESTIONS PRESENTED.	i
TABLE OF AUTHORITIES	vii
INTRODUCTION	1
OPINIONS BELOW	2
JURISDICTION	2
CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS INVOLVED . .	5
STATEMENT OF THE CASE.	5
ARGUMENT	17
I. THE FEDERAL QUESTIONS ARE SUBSTANTIAL	17
II. THIS COURT HAS JURISDICTION .	24
III. DUE PROCESS	37
A. The Application of Rhode Island Supreme Court Rule 3(c) to DeLeo In This Case to Preclude Him From a Determination of His	

PAGE

First Amendment Defenses Violated His Due Process Rights . . 37

B. The Rhode Island Supreme Court's Application of the Doctrine of Collateral Estoppel to Preclude DeLeo from Raising the Public Trust Doctrine as a Constitutional Defense Violated DeLeo's Due Process Rights 41

C. The Holding of the Rhode Island Supreme Court that the Evidence Sufficiently Supported the Slander Judgment Without the Court's Having Conducted a Searching Review of the Record Offends Due Process. 45

IV. THE FIRST AMENDMENT 49

A. The Applicable Principles 49

B. The Rhode Island Supreme Court Applied a Strict Liability Standard in Reviewing the Slander of Title Judgment under Rhode Island Law, in Violation of DeLeo's First Amendment Rights . . . 55

PAGE

C. DeLeo's Statements that the Public Retained an Interest in Appellees' Filled Tidelands Were True, Reasonable and Without Actual Malice and Are Therefore Protected Under the First Amendment. 57

CONCLUSION 65

TABLE OF AUTHORITIES

CASES	PAGE
Allen v. Allen, 19 R.I. 114, 32 A. 166 (1895)	60,62
American Manufacturers Mutual Ins. Co. v. American Broadcasting - Paramount Theatres, Inc. 17 L.Ed. 2d 37, 87 S.Ct. 1 (1966).	17
American Surety Co. v. Baldwin, 287 U.S. 156 (1932)	37
Ancient Egyptian Arabic Order of Nobles v. Michaux, 279 U.S. 737 (1929)	18,32
Appleby v. City of New York, 271 U.S. 364 (1926)	57
Atlantic Coast Line R. Co. v. Mims, 242 U.S. 532 (1971)	34
Berman v. Parker, 348 U.S. 26 (1954).	58
Bigelow v. Virginia, 421 U.S. 809 (1975).	52
Bill Johnson's Restaurants, Inc. v. N.L.R.B., 461 U.S. 731 (1983).	20
Bose Corp. v. Consumers Union of U.S., Inc., 466 U.S. 485 (1984).	44,46 47,48

CASES	PAGE
Boston Waterfront Development Corp. v. Commonwealth, 378 Mass. 629, 393 N.E.2d 356 (1979). . . .	63,64
Bouie v. City of Columbia, 378 U.S. 347 (1964)	38
Brinkerhoff-Faris Trust Co. v. Hill, 281 U.S. 673 (1930)	29,33,38
Buckley v. Valeo, 424 U.S. 1 (1976).	58
California Motor Transport Co. v. Trucking Unlimited, 404 U.S. 508 (1972).	56
Carondelet Canal and Navigation Company v. State of Louisiana, 233 U.S. 362 (1914)	31
Carson v. Allied News Co., 529 F.2d 206 (7th Cir. 1976).	51
Central Union Telephone Co. v. City of Edwardsville, 269 U.S. 190 (1925).	38
City of Alameda v. Todd Shipyards Corp., 632 F. Supp. 333 (1986). .	62
City of Berkeley v. Superior Court of Alameida County, 606 P.2d 362 (Cal.), cert. denied sub nom, Santa Fe Land Improv. Co. v. Berkeley, 449 U.S. 840 (1980) . .	63
Cole v. Charron, 477 A.2d 959 (R.I. 1984)	41
Corn Products Refining Co. v. Eddy, 249 U.S. 427 (1919)	24

CASES	PAGE
Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 (1975)	i, 31
Cox v. Louisiana, 379 U.S. 536 (1965).	48
Crowell v. Benson, 285 U.S. 22 (1932).	23
Curtis Publishing Co. v. Butts, 388 U.S. 130 (1967)	20,54
Dahnke-Walker Milling Co. v. Bondurant, 257 U.S. 282 (1921). .	18,26
Dawson v. Broome, 24 R.I. 359 (1902).	62
De Carvalho v. Da Silva, 414 A.2d 806 (R.I. 1980)	51
Dewey v. Des Moines, 173 U.S. 193 (1899).	54
Don's Porta Signs, Inc. v. City of Clearwater, 99 L.Ed.2d 491, 108 S.Ct. 1280 (1988)	46
Dun & Bradstreet, Inc. v. Greenmoss Builders, 472 U.S. 749 (1985).	50,51,52
Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127 (1961).	55
Engs v. Peckham, 11 R.I. 210 (1875).	62
Evers v. County of Custer, 745 F.2d 1196 (9th Cir. 1984)	19

CASES	PAGE
Evitts v. Lucey, 469 U.S. 387 (1985)	37
First National Bank of Boston v. Belotti, 435 U.S. 765 (1978)	50,52
Fiske v. Kansas, 297 U.S. 380 (1927)	48
Foman v. Davis, 371 U.S. 178 (1962)	40
Forgay v. Conrad, 16 U.S. 653 (1897)	31
Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974)	passim
Gorman Towers, Inc. v. Bogoslavsky, 626 F.2d 607 (8th Cir. 1980)	19
Great Northern R. Co. v. Sunburst Oil and Refining Co., 287 U.S. 358 (1932)	29
Harlow v. Fitzgerald, 457 U.S. 800 (1982)	49, 61
Hawaii Housing Authority v. Midkiff, 467 U.S. 229 (1984)	58
Henry v. Mississippi, 379 U.S. 443 (1965)	33, 38
Herbert v. Lando, 441 U.S. 153 (1979)	51, 54
Herndon v. Georgia, 295 U.S. 441 (1935)	28

CASES	PAGE
Hopkins v. Drowne, 41 A. 567 (1898).	35,45,55
Illinois v. Gates, 462 U.S. 213 (1983).	54
Illinois Central R. Co. v. Illinois, 146 U.S. 387 (1892).	49,57,61, 62,63
In Re IBP Confidential Business Documents Litigation, 800 F.2d 787 (8th Cir. 1986).	55,56
International Brotherhood of Electrical Workers v. Forest, 442 U.S. 42 (1979).	20
Jackvony v. Powell, 67 R.I. 218, 21 A.2d 554 (1941).	60
Kootenai Environ. Alliance v. Panhandle Yacht Club, 671 P.2d 1085 (Idaho 1983)	59,64
Lawton v. Vadenais, 122 A.2d 138 (R.I. 1956)	51
Lerman v. Flynt Distributing Co., Inc., 745 F.2d 123 (2d Cir. 1984)	51
Letendre v. Rhode Island Hosp. Co., 74 R.I. 276, 60 A.2d 471 (1948).	27
Light v. U.S., 220 U.S. 523 (1911).	59
Littlefield v. Fort Dodge Messenger, 614 F.2d 581 (8th Cir.), cert. denied, 445 U.S. 945 (1980).	51

CASES	PAGE
Louisville and Nashville Railroad Co. v. Kentucky, 161 U.S. 677 (1896).	58
Louisville and Nashville Railroad Co. v. Mottley, 211 U.S. 149 (1908).	28
Marks v. Whitney, 491 P.2d 374 (Cal. 1971)	59
McCullough v. Virginia, 172 U.S. 102 (1898).	25
McDonald v. Smith, 472 U.S. 479 (1985).	30,44,46, 53,54,55,56
Michel v. Louisiana, 350 U.S. 91 (1955).	38
Michigan v. Long, 463 U.S. 1032 (1983).	36,37
Mills v. Alabama, 384 U.S. 214 (1966).	31
Minnesota v. National Tea Co., 309 U.S. 551 (1940)	36
Missouri ex rel. Missouri Ins. Co. v. Gehner, 281 U.S. 313 (1930). .	29
Monger v. Florida, 405 U.S. 958 (1972)	17,38
Monitor Patriot Co. v. Roy 401 U.S. 265 (1971).	48
Morse v. Oregon Division of State Lands, 590 P.2d 709 (Or. 1979). .	63

CASES	PAGE
Munn v. Illinois, 94 U.S. 113 (1877).	58
N.A.A.C.P. v. Alabama, 377 U.S. 288 (1964).	32,33,39
N.A.A.C.P. v. Alabama, 357 U.S. 449 (1958).	33
Nagy v. McBurney, 392 A.2d (365) (R.I. 1978)	30,49,51, 61,64
National Audubon Society v. Superior Court of Alpine County, 658 P.2d 709 (Cal.), cert. denied sub nom, Los Angeles Dept. of Water and Power v. National Audubon Soc., 464 U.S. 977 (1983)	63
New Orleans Waterworks Co. v. Louisiana Sugar Refining Co., 125 U.S. 18 (1888).	27
New York Times v. Sullivan, 376 U.S. 254 (1964)	17,48,53
Ng Fung Ho v. White, 259 U.S. 276 (1922).	23
Norris v. Alabama, 294 U.S. 587 (1935).	48
Ollman v. Evans, 713 F.2d 838 (D.C. Cir. 1983), rehearing en banc, 750 F.2d 970 (1984), cert. denied, 471 U.S. 1127 (1985).	51
Opinion of the Justices, 383 Mass. 895, 494 N.E.2d 1092 (1981) . . .	59

CASES	PAGE
Parrot v. City of Tallahassee, 381 U.S. 129 (1965)	65
Pearson v. Old Stone Savings Bank, 119 R.I. 836, 383 A.2d 1029 (1978).	13
Pennekamp v. Florida, 328 U.S. 328 U.S. 331 (1946)	44
Philadelphia Newspapers, Inc. v. Hepps, 475 U.S. 767 (1986). . . .	50,52,53
Pope v. Atlantic Coast Line R. Co. 345 U.S. 379 (1953)	31
Postal Telegraph Cable Company v. City of Newport, Kentucky, 247 U.S. 464 (1918)	35,44
Pruneyard Shipping Center v. Robins 447 U.S. 74 (1980)	28
Radio Station WOW, Inc. v. Johnson, 326 U.S. 120 (1945). . .	31
Rankin v. McPherson, ____ U.S. ____,107 S.Ct. 2891 (1987) . . .	44,46,48
Rogers v. Alabama, 192 U.S. 226 (1904).	18
St. Joseph Stock Yards v. U.S., 298 U.S. 38 (1936).	22
Saunders v. Shaw, 244 U.S. 317 (1917).	29
Scotland v. Pennsylvania, 398 U.S. 916 (1970)	18
Stanley v. Illinois, 405 U.S. 645 (1972).	54

CASES	PAGE
State v. Village of Lake Delton, 286 N.W.2d 622 (Wisc. App. 1979).	59
State of Vermont v. Central Vermont Railway, Inc., Chittendon Sup. Ct. No. 5966-84 CC (Sept. 23, 1987).	63
Staub v. City of Baxley, 355 U.S. 313 (1958).	33
Stewart v. Sonnenborn, 98 U.S. 187 (1878).	49
Sunward Corp. v. Dun & Bradstreet, 811 F.2d 511 (10th Cir. 1987).	51
Thomas v. Arn, 474 U.S. 140 (1985).	38,39
Thomas v. Saunders, 413 N.E.2d 1224 (Ohio App. 1979)	63
Time, Inc. v. Firestone, 424 U.S. 448 (1976).	51
Time, Inc. v. Pape, 401 U.S. 279 (1971).	48
United Mine Workers of America v. Pennington, 381 U.S. 657 (1965) .	36,55
U.S. v. UAW-CIO, 352 U.S. 567 (1957).	58
U.S. v. 1.58 Acres of Land, 523 F. Supp. 120 (D. Mass. 1981). . .	59,63
Warren v. Bank of Marion, 618 F. Supp. 317 (W.D. VA. (1985) . .	52

CASES	PAGE
Welsh Mfg., Div. of Textron, Inc. v. Pinkerton's, Inc. 474 A.2d 436 (R.I. 1984)	51
Western Union Tel. Co. v. Kansas, 216 U.S. 1 (1970)	24
Williams v. Bruffy, 96 U.S. 176 (1878).	27
Williamson Cty. Regional Planning Commission v. Hamilton Bank of Johnson City, 473 U.S. 172 (1985)	28
Wolfe v. North Carolina, 364 U.S. 177 (1960).	34
Wright v. Georgia, 373 U.S. 284 (1963).	33
CONSTITUTIONAL PROVISIONS	
U.S. Const. Amend. I	passim
U.S. Const. Amend. XIV	passim
R.I. Const. Art. I, Section 17 . .	49,50
STATUTES	
28 U.S.C. § 1257(2).	passim
28 U.S.C. § 1257(3).	4
28 U.S.C. § 2103	i
G.L.R.I. §8-6-2	3, 26
R.I. Supreme Court Rule 3(c) . . .	passim
R.I. Supreme Court Rule 4.	5,12, 14,27

STATUTES	PAGE
R.I. Supreme Court Rule 16 (h) . .	5,11,32
R.I. Civil Practice Rule 54(b) . .	5,13
LEGLISLATIVE MATERIALS	
Cong. Rec. Index, 100th Cong. (CCH), p. 20,053 (July 29, 1988).	3
Pub. L. No. 100-352, 102 Stat 662 (1988)	3
BOOKS	
Restatement (Second) of Torts, §580B, Comment c, Comment d; §652E Caveat and Commentary d (1976).	51
Kent, Rhode Island Practice. §73.5, n. 49 (1969)	40
Keeton, Prosser and Keeton on Torts, §128 (5th Ed. 1984). . . .	52
LAW REVIEW ARTICLES	
Hill, The Inadequate State Ground, 65 Colum. L. Rev. 943 (1965)	39
Note, Counterclaim and Countersuit Harassment of Private Environmental Plaintiffs: The Problem, Its Implications, and Proposed Solutions, 74 Mich. L. Rev. 106 (1975)	21
Note, The Public Trust in Tidal Waves, 79 Yale L. J. 762 (1970).	59

CASES PAGE

LAW REVIEW ARTICLES PAGE

Pell, Lawsuits that Chill Local Politics, Cal. Law., Feb. 1984, at 40 21

PERIODICALS

Pell, Libel as a Political Weapon, The Nation, June 6, 1981. 21

Pring, Intimidation Suits Against Citizens: A Risk for Public-Policy Advocates, Nat'l L. J., July 22, 1985, at 16, col.. . . . 21

A New Kind of Hush Money, Newsweek, June 3, 1985. 21

JURISDICTIONAL STATEMENT

INTRODUCTION

Appellants, Raymond DeLeo and Anna A. DeLeo ("DeLeo"), are before this Court appealing the judgment of the Supreme Court of Rhode Island and Providence Plantations ("Rhode Island Supreme Court") entered August 24, 1988, rehearing denied September 21, 1988. This Jurisdictional Statement is submitted to show that the state procedural grounds adopted by the Rhode Island Supreme Court to refuse to hear DeLeo's First Amendment defenses to a judgment entered for allegedly slanderous speech are not only inadequate to preclude review of the First Amendment defenses in this Court but also violate DeLeo's due process rights under the Fourteenth Amendment. The Jurisdictional Statement will further demonstrate that the statements made by DeLeo are squarely protected under the First Amendment and that the issues presented to this Court are

substantial.

OPINIONS BELOW

The opinion of the Rhode Island Supreme Court appealed from, App. A at 1a, is reported at 546 A.2d 1344 (August 24, 1988). The Rhode Island Supreme Court's order of September 21, 1988 denying DeLeo's Petition for Reargument, App. B at 21a; the 1982 interlocutory order of the Superior Court of Rhode Island vacating DeLeo's lis pendens filing, App. E at 70a; and the 1982 interlocutory order of the Superior Court of Rhode Island dismissing DeLeo's complaint, App. F at 80a; are all unreported.

JURISDICTION

This appeal, notice of which was filed in the Rhode Island Supreme Court and Superior Court on September 23, 1988 and brought here pursuant to 28 U.S.C.

§1257(2),[2] draws into question Rhode Island Supreme Court Rule 3(c)[3] -- which under Rhode Island law has the force and effect of statute (G.L.R.I. §8-6-2) -- as applied to DeLeo and upheld against a federal constitutional challenge raised at the earliest possible opportunity. The grounds for the appeal are that Rule 3(c), as construed and applied, impermissibly curtailed DeLeo's First Amendment right to establish the truth of his statements of law on a

---

2/ DeLeo acknowledges Senate Bill 952 which revokes the appellate jurisdiction of this Court under Section 1257(2) effective ninety days after the President signed the bill into law on June 27, 1988, or September 25, 1988. See Cong. Rec. Index, 100th Cong. (CCH), p.20,053 (July 29, 1988). Such revocation, however, does not "affect the right to review or the manner of reviewing the judgment or decree of a court which was entered before such effective date." Pub. L. No. 100-352, §7, 102 Stat. 662, 664 (1988). Since the Supreme Court of Rhode Island entered final judgment on August 24, 1988 and denied DeLeo's Petition for Reargument on September 21, 1988, this appeal falls within the grandfather provision of Senate Bill 952.

3/ Rule 3(c) provides, in relevent part, that the notice of appeal "shall designate the judgment, order or decree or part thereof appealed from." App. N at 120a.

matter of pressing public concern as a defense to appellees' counterclaim judgments sounding in slander for compensatory and punitive damages, and is therefore invalid under the Due Process Clause of the Fourteenth Amendment to the United States Constitution. The judgment appealed from is dated August 24, 1988. DeLeo's petition for reargument was denied on September 21, 1988.[4] The jurisdiction of the Court to hear this appeal is more fully briefed below. See Section II below.

4/ This Court has certiorari jurisdiction over all the issues presented pursuant to 28 U.S.C. §1257(3). The Rhode Island Supreme Court's invocation of novel and arbitrary procedural doctrines to preclude it from determining the truth, reasonableness or, lack of knowing falsity of DeLeo's legal claims as a slander defense violates DeLeo's Due Process rights under the Fourteenth Amendment, and its affirmance of the slander judgment against DeLeo despite the truth, reasonableness or lack of knowing falsity of his statements violates DeLeo's First Amendment rights.

CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS INVOLVED

This case involves the Fourteenth Amendment to the United States Constitution; the First Amendment to the United States Constitution; Supreme Court of Rhode Island Rules 3(c), 4 and 16(h); and Rhode Island Civil Practice Rule 54(b). These constitutional, statutory and regulatory provisions are reproduced at App. N at 118a.

STATEMENT OF THE CASE

DeLeo lives in Bristol, Rhode Island, across the street from the properties of appellees, Anthony A. Nunes, Inc. ("Nunes") and Sally Appleton ("Appleton"), which front the shore at a point called Walker's Cove. DeLeo also owns property which abuts appellees' waterfront lots (Pl. Exh. 28). Portions of appellees' waterfront property consist of tidelands which were filled in 1933 pursuant to permits issued to the Herreshoff Manufacturing Company, a shipbuilder, by the U.S. War Department.

These permits expressly provided that they did not grant any property right in real estate or any exclusive privilege to the Herreshoff Manufacturing Company. (Def. Exh. DD). The parcels at Walker's Cove passed eventually to appellee Nunes, a real estate developer, whose quitclaim deed (Pl. Exh. 2.) was the first to reference the filled lands as part of the conveyed premises. In 1980, Nunes' proposed to build a private condominium style development on the property. Subsequently, Nunes conveyed one lot with improvements to appellee Appleton, again by quitclaim deed. That deed referenced restrictions as to claims "asserted by the United States of America and/or state of Rhode Island and Providence Plantations in and to any portions of said lot created by filling between the natural high water line and the harbor line." (Pl. Exh. 10).

In 1980, Nunes' plans to develop these

filled tidelands by erecting private homes began to emerge. Nunes published brochures illustrating those plans and soliciting offers. Tr. III, 85. DeLeo, along with several of his neighbors, Tr. III, 171-82, vigorously opposed this development on the legal ground that the public's interest in and access to these filled tidelands which would be foreclosed by Nunes' development, were protected under the public trust doctrine against elimination by purely private residential development. DeLeo appeared on numerous occasions before local and state zoning and planning agencies to present this legal argument, and wrote letters to the same effect to several public officials. Pl. Exh. 45-50; Tr. II, 229.[5]

5/ In addition to the public's interest in all this land, DeLeo claimed a personal, but not exclusive, Tr. V, 153, interest in a small triangular outcropping on the portion of the land Nunes sold to Appleton, arguing that as the owner of the upland

(Footnote Continued on Next Page)

On September 3, 1981, DeLeo filed a complaint against Nunes in Rhode Island Superior Court for a declaratory judgment as to the claimed interests and for injunctive relief. Later he amended the complaint to include Appleton. (Pl. Exh. 24). Contemporaneously, DeLeo filed notices of lis pendens against the Nunes and Appleton property. (Pl. Exhs. 25 and 27). On October 22, 1982, a justice of the Rhode Island Superior Court ruled that the lis pendens were null and void because, under his view of Rhode Island law, all public trust rights in the Nunes and Appleton tideland properties had been extinguished

---

5/ (Footnote Continued From Previous Page)

perpendicularly fronting the triangular outcropping, he had rights to the use of this filled land under Rhode Island law. In making this legal claim, DeLeo consulted and relied on the opinions of several professional title examiners. Tr. V, 107, 112; Def. Exh. EE. In developing Appleton's land, appellee Nunes removed this triangular outcropping from the coastline to use as landfill on another part of the property in late 1982 and early 1983.

when the lands were filled in 1933, notwithstanding the express disclaimers on the permits to fill. App. E at 70a.[6] Based on this ruling, an order entered in December 1982 dismissing the complaint. App. F at 80a. DeLeo attempted to appeal this dismissal, but that appeal was dismissed as premature in January 1983, since the rights and liabilities of all the litigants had not yet been adjudicated. App. G at 82a.

Meanwhile, Nunes and Appleton had counterclaimed against DeLeo alleging slander of title, abuse of process and malicious use of process. During the trial in the fall of 1985, DeLeo asserted the truth, reasonableness and lack of actual malice of his public trust claims given his reliance upon the applicable public trust law and advice of counsel. Tr. V, 106-11, 114-17, 124-26,

---

6/ The trial judge did not rule on DeLeo's legal claim to rights in the triangular piece.

133. The trial judge specifically addressed the merits of these First Amendment defenses on several occasions. Tr. IV, 224-26; Tr. V, 7; Tr.(New Trial Motion 5/1/86) 4-6. After directing verdicts in favor of DeLeo on the abuse of process and malicious use of process counts, the trial justice sent the case to the jury on the slander of title counterclaim. The jury returned a general verdict against DeLeo for compensatory damages of $104,114 and punitive damages of $75,000 in favor of appellee Nunes. Compensatory damages of $3,000 and punitive damages of $7,000 were awarded to appellee Appleton. On motion, the trial court ordered a remittitur of Nunes' compensatory damage award to $89,421 and his punitive damage award to $30,000. The awards to Appleton were undisturbed.

DeLeo appealed the judgment to the Rhode Island Supreme Court by filing a timely notice of appeal which specifically

indicated that he was appealing the final judgment entered in the case. App. H at 84a. He did so by checking a box on a standardized notice of appeal form labeled "Judgment/Jury." He did not check an adjacent box labeled "Dismissal Merits" because he had determined not to pursue his complaint. Subsequently, in accordance with Rhode Island procedure, see Rhode Island Supreme Court Rule 16(h), and well in advance of any briefing, he filed and served a pre-briefing statement with the Rhode Island Supreme Court and appellees specifically designating the issues he intended to raise on appeal. These issues included the propriety of the trial justice's 1982 determination that the public's interest in appellees' filled tidelands had been extinguished by filling and whether DeLeo's arguments were privileged under the First Amendment. App. J at 92a.

In his brief to the Rhode Island

Supreme Court, DeLeo argued extensively the truth of his legal claim that the public retained an interest in appellees' filled tidelands under the public trust doctrine. He further argued that his reasonable and not knowingly or recklessly false belief in the public's surviving interest in appellees' tideland property based on the public trust doctrine, constituted a complete First Amendment defense to appellees' counterclaims alleging slander. In their responsive brief, appellees argued (without citing any precedent on point) that DeLeo was precluded from raising the public trust doctrine as a defense to appellees' counterclaims under Rhode Island Supreme Court Rule 3(c) because he failed to mark the box labeled "Dismissal Merits" on the standardized notice of appeal form. In reply, DeLeo cited Supreme Court Rule 4, which clearly states that "an appeal from a judgment preserves for review <u>any</u> claim of

error in the record." (Emphasis supplied.) DeLeo further cited Pearson v. Old Stone Savings Bank, 119 R.I. 836, 383 A.2d 1029 (1978), holding that under Rhode Island law a final judgment incorporates and subsumes all interlocutory orders which may have preceded it; and Rhode Island Civil Practice Rule 54(b), which provides that accelerated entry of final judgment on an interlocutory order can be made only by an express determination of the court. No such accelerated final judgment was requested or made concerning either the order to vacate the lis pendens or the dismissal of DeLeo's complaint.

In its decision dated August 24, 1988, the Rhode Island Supreme Court embraced appellees' Rule 3(c) argument almost verbatim, holding that DeLeo's failure to specifically appeal the dismissal of his complaint precluded any consideration of the merits of his public trust claim (i.e., its

truth) as a defense to the slander of title counterclaims and judgment. In so holding, the Rhode Island Supreme Court applied Rule 3(c) in an unprecedented and arbitrary fashion. DeLeo had specifically appealed from the final judgment entered against him on appellees' slander of title counterclaims and thus was entitled under the plain language of Rule 3(c) and Rule 4 as well to raise and have resolved on appeal any and all defenses to the judgment.

The Rhode Island Supreme Court further held that the trial court's determination at the lis pendens hearing in the very same case, to the effect that the public retained no interest in appellees' filled tidelands sufficient to support the filing of a lis pendens, collaterally estopped DeLeo on appeal from raising the public trust doctrine as a defense in any manner whatsoever (i.e., from raising the reasonableness and lack of actual malice of his public trust

claims as a First Amendment defense to the slander judgment incurred). On this basis, the Rhode Island Supreme Court categorically declined to address any of DeLeo's arguments and cursorily affirmed the compensatory and punitive damage awards on a record which it construed as evidencing a malicious motive. App. A at 10a; 546 A.2d at 1346. The court also reversed the direction of verdicts entered by the trial court in DeLeo's favor on appellees' abuse of process and malicious use of process counterclaims, citing the same alleged evidence of malicious motive and again ignoring DeLeo's brief and his First Amendment defenses. App. A at 14a; 546 A.2d at 1347. It remanded the case to the trial court for further proceedings on the abuse of process and malicious use of process counterclaims and ordered a new trial on the slander of title damage award if appellees did not comply with the trial court's remittitur.

On August 29, 1988, DeLeo filed a petition for reargument, alleging the unconstitutionality of Rule 3(c) as applied, the unconstitutional application of collateral estoppel, and the truncated appellate review afforded him. App. B at 21a. On September 21, 1988, the petition for reargument was summarily denied. App. C at 65a. On September 23, 1988, the day DeLeo filed his notice of appeal to this Court in the Rhode Island Supreme Court and Superior Court, appellees noticed their consent to the trial judge's remittitur. App. M at 115a. A writ of execution on the judgment issued on September 26, 1988. App. I at 88a. Appellees have consented to stay execution pending the outcome of proceedings in this Court in consideration for security sufficient to guarantee payment of the judgment. App. P at 138a.

ARGUMENT

I. THE FEDERAL QUESTIONS ARE SUBSTANTIAL

A substantial federal question is presented whenever meritorious First Amendment defenses are rejected on the basis of suspect procedural technicalities. Monger v. Florida, 405 U.S. 958, 960 (Douglas, J., with Brennan, J., and Stewart, J., dissenting from denial of certiorori by reason of adequate and independent state law grounds). See also American Manufacturers Mutual Ins. Co. v. American Broadcasting - Paramount Theatres, Inc., 17 L.Ed.2d 37, 39, 87 S.Ct. 1 (1966) (Harlan, J., in chambers). Moreover, given the "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open," New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964), DeLeo's First Amendment defenses of truth, reasonableness and lack of actual malice are serious and substantial,

especially in the context of vindicating threatened public rights to scarce natural resources, and should be considered by this Court. Scotland v. Pennsylvania, 398 U.S. 916, 921 (1970) (Douglas, J., dissenting from dismissal of appeal). Particularly where, as here, it is plain that the direct result of the procedural trap employed below is to deny constitutional rights, this Court should not decline jurisdiction. Rogers v. Alabama 192 U.S. 226, 230 (1904); See also Ancient Egyptian Arabic Order of Nobles v. Michaux, 279 U.S. 737, 745 (1929) (federal right, though not denied in terms, is denied in substance and effect where state ground of decision having no fair support is imposed). The deleterious effect of these procedural and substantive deprivations is not limited to DeLeo. The public interest as a whole has been severely compromised. See Dahnke-Walker Co. v. Bondurant, 257 U.S. 282, 294 (1921) (Brandeis, J., dissenting).

First, the Rhode Island Supreme Court's arbitrary refusal to protect DeLeo's First Amendment right to assert the applicability of the public trust doctrine sends a chilling message to all parties who may wish to challenge the rampant shorefront real estate development presently underway in Rhode Island (as well as in other states) by presenting their legal claims before duly constituted governmental bodies, and, therefore, is of enormous significance for the future of citizen participation in government and public affairs generally. See App. O at 129a. Such citizen participants are now on notice that their anti-development petitioning activities may fail to receive the First Amendment protection they clearly deserve (see Evers v. County of Custer, 745 F.2d 1196, 1200-01 (9th Cir. 1984); Gorman Towers, Inc. v. Bogoslavsky, 626 F.2d 607, 611 (8th Cir. 1980)); and that they run the risk of incurring punitive damages for efforts

which should be encouraged and protected. Punishing litigants who raise unpopular views has been flagged on numerous occasions by this Court as a substantial problem in the First Amendment area. See International Brotherhood of Electrical Workers v. Foust, 442 U.S. 42, 50-51, n.14 (1979); Gertz v. Robert Welch, Inc., 418 U.S. 323, 350 (1974); Curtis Publishing Co. v. Butts, 388 U.S. 130, 160 (1966).

Moreover, as this Court has recently acknowledged in the context of labor disputes (see Bill Johnson's Restaurants, Inc. v. N.L.R.B., 461 U.S. 731, 740-41 (1983)) intimidation, retaliation or harassment lawsuits and counterclaims alleging such tortious conduct as defamation, malicious prosecution, abuse of process, and interference with contractual or business relations or with prospective advantage, pose a serious threat to organizations and individuals who involve themselves in issues of public

importance.[7] The Rhode Island Supreme Court's decision, if allowed to stand, would condone the practice and exacerbate the problem. DeLeo, by vigorously advancing his view that the public retains an interest in appellees' lands under the public trust doctrine has done nothing more than engage in robust political speech on a matter of utmost public concern. As a recompense for this important and salutary activity, DeLeo has been held preclusively liable on one state tort claim and will be forced back to court on two others by a state supreme court which has bent over backwards to refuse to hear his First Amendment defenses. The Rhode Island Supreme Court's hostile

---

7/ See Note, Counterclaim and Countersuit Harassment of Private Environmental Plaintiffs: The Problem, Its Implications, and Proposed Solutions, 74 Mich. L. Rev. 106 (1975); Pring, Intimidation Suits Against Citizens: A Risk for Public-Policy Advocates, Nat'l L. J., July 22, 1985, at 6, col. 1; Pell, Lawsuits That Chill Local Politics, Cal. Law., Feb. 1984, at 40; A New Kind of Hush Money, Newsweek, June 3, 1985, at 61; Pell, Libel as a Political Weapon, The Nation, June 6, 1981, at 1.

attitude toward DeLeo's exercise of his First Amendment rights is graphically evidenced by its finding that DeLeo's statement after an early administrative hearing that, "this encounter would be the first of fifty battles, if necessary, to continue to oppose appellees' enterprise," demonstrated his malicious intent. App. A at 11a; 546 A.2d at 1347. True to his word, DeLeo is now before this Court to vindicate his right to speak out on the public trust doctrine before state authorities unwilling to address or enforce it. Such tenacity, far from meriting rebuke, should be supported and protected as the epitome of robust speech on a matter of public concern.

Finally, the fundamental constitutional guarantee that an aggrieved party is entitled to the independent judgment of some court on a constitutional challenge to governmental conduct (cf. St. Joseph Stock Yards Co. v. U.S., 298 U.S. 38, 84 (1936)

(Brandeis J. concurring); Crowell v. Benson, 285 U.S. 22, 46 (1932); Ng Fung Ho v. White, 259 U.S. 276, 284 (1922)) mandates summary reversal or that the Court accept this case and afford it plenary review. Otherwise, DeLeo's due process and First Amendment challenges to the arbitrary opinion of the Rhode Island Supreme Court will go unheard by any court. This is a profoundly unsettling result entailing adverse systemic consequences. DeLeo, unaware and incapable of challenging the unconstitutionality of the Rhode Island Supreme Court's refusal to hear his First Amendment defenses until receiving that court's opinion, raised his constitutional due process claims at the earliest possible opportunity -- on petition for reargument filed within five days of receipt of the opinion, App. B at 12a, but that court denied the petition without any explanation or discussion whatsoever. App. C at 65a. This Court, then, provides the

first and only real opportunity for DeLeo to present his claim of constitutional deprivation before a court of competent jurisdiction.

II. THIS COURT HAS JURISDICTION

The fact that the Rhode Island Supreme Court did not explicitly cite its Rule 3(c) in holding that, because DeLeo's "claim of appeal is specifically directed at the counterclaim phase of this dispute ... the merits of the 1982 adjudication will not be considered by this Court," App. A at 5a; 546 A.2d at 1345-46, is no bar to this Court's jurisdiction to hear this appeal pursuant to 28 U.S.C. §1257(2). A close reading of the Rhode Island Supreme Court's opinion clearly demonstrates that Rule 3(c) provided the grounds for its determination to refuse to review DeLeo's extensively briefed First Amendment defense of truth. Corn Products Refining Co. v. Eddy, 249 U.S. 427, 432 (1919); Western Union Tel. Co. v. Kansas,

216 U.S. 1, 26 (1910); McCullough v. Virginia, 172 U.S. 102, 116 (1898). Rule 3(c) recites that the notice of appeal "shall designate the judgment, order or decree or part thereof appealed from." App. N at 120a. The Rhode Island Court's refusal to review the merits (i.e., the truth) of DeLeo's public trust claims as a First Amendment defense[8] because "his claim of appeal" was only directed at the counter-claim phase of the dispute not only tracks the language of Rule 3(c), but is also a paraphrase of appellees' argument on appeal that DeLeo's failure to appeal the dismissal of his complaint bars him from asserting the validity of his legal claim as a First Amendment slander defense under Rule 3(c). App. K at 100a. Moreover, DeLeo's

---

8/ At no point in his brief before the Rhode Island Supreme Court did DeLeo raise the merits of his claim (i.e., its truth) offensively. DeLeo's posture on appeal was entirely defensive and directed toward overturning the substantial damage judgment incurred.

challenge to the constitutionality of Rule 3(c) was raised before the Rhode Island Supreme Court at the earliest opportunity -- as soon as that court applied the rule to preclude review of DeLeo's defenses -- and was unmistakable and explicit. App. B at 27a. Accordingly, the Rhode Island Supreme Court has upheld its interpretation of Rule 3(c) against a constitutional challenge as required under section 1257(2).

It has long been settled by this Court that section 1257(2) encompasses statutory enactments which are facially innocuous but constitutionally infirm as applied to an individual litigant. See Dahnke-Walker Milling Co. v. Bondurant, 257 U.S. 282, 290 (1921). So, too, the fact that the challenged state legislation is a rule promulgated by the Rhode Island Supreme Court is not a bar to Section 1257(2) review. The rule was promulgated under Section 8-6-2 of the General Laws of Rhode

Island, which gives it the force and effect of a statute. Letendre v. Rhode Island Hosp. Co., 74 R.I. 276, 60 A.2d 471, 474, (1948). It is, therefore, a statute within the meaning of section 1257(2). New Orleans Waterworks Co. v. Louisiana Sugar Refining Co., 125 U.S. 18, 31 (1888); Williams v. Bruffy, 96 U.S. 176, 183 (1878).

Furthermore, the Rhode Island Supreme Court's application of Rule 3(c) to DeLeo, to the effect that a litigant may be precluded on appeal from a determination of his legal claim as a defense merely because he has chosen not to pursue it offensively, did not exist before that court so held on appeal in this case. Given the plain language of Rules 3(c) and 4 belying this unusual interpretation and the lack of any precedent supporting it, the interpretation and its effect were entirely novel and could not have been challenged by DeLeo prior to

that court's August 24, 1988 decision. The fact, therefore, that he raised his constitutional challenge for the first time in his Petition for Reargument to the Rhode Island Supreme Court, App. B at 21a, which denied it summarily on September 21, 1988, does not invalidate this appeal, since he raised the challenge at the earliest possible opportunity.[9] Pruneyard Shipping Center v. Robins, 447 U.S. 74, 86, n. 9. (1980); Herndon v. Georgia, 295 U.S. 441, 444

---

[9] The constitutionality of the Rhode Island Supreme Court's application of Rule 3(c) to DeLeo was not an issue properly before that court until it actually applied Rule 3(c) to DeLeo in its August 24, 1988, decision. To require, for purposes of reviewing the constitutionality of that court's application of Rule 3(c) here, that DeLeo have anticipated that court's determination and prematurely challenged its constitutionality, is incompatible with this Court's decisions requiring that a constitutional challenge be ripe before it is adjudicated. Cf. Williamson Cty. Regional Planning Commission v. Hamilton Bank of Johnson City, 473 U.S. 172, 194 n.13 (1985); and this Court's determination that original federal jurisdiction cannot be acquired by raising an anticipatory constitutional challenge to an adversary's defense on a state law claim. Cf. Louisville and Nashville Railroad Co. v. Mottley, 211 U.S. 149, 152, 153 (1908).

(1935); Great Northern R. Co. v. Sunburst Oil and Refining Co., 287 U.S. 358, 367 (1932); Brinkerhoff-Faris Trust Co. v. Hill, 281 U.S. 673, 678 (1930); Missouri ex rel. Missouri Ins. Co. v. Gehner, 281 U.S. 313, 320 (1930); Saunders v. Shaw, 244 U.S. 317, 320 (1917).

The judgment for slander of title is final for purposes of review in this Court. Execution of the judgment is being stayed only pending the outcome of proceedings here. Nor does the Rhode Island Supreme Court's remand to the trial court for further proceedings on appellees' abuse of process and malicious use of process counterclaims affect finality for purposes of this appeal. The Rhode Island Supreme Court's ruling that collateral estoppel bars any defensive use of the public trust doctrine by DeLeo will be binding on the lower court when those counterclaims are addressed on remand. But DeLeo has only one

defense to these counterclaims: the fact that his lis pendens filings were reasonably supported by the applicable public trust law which DeLeo relied upon in making his claims and therefore, were made with probable cause under Rhode Island law (Nagy v. McBurney, 392 A.2d 365 (1978)), and constitute First Amendment protected speech on a matter of pressing public concern under Gertz v. Robert Welch, Inc., 418 U.S. 323, 347 (1979); and under McDonald v. Smith, 472 U.S. 479, 485 (1985) as petitioning activity before governmental bodies. See Section IV.A. below. Since this, his only defense, has already been denied him, judgment against him on remand in the trial court is preordained, and the judgment which will inevitably enter against him on those counterclaims will return to this Court for review under the United States Constitution on the very same grounds as presently before the Court. Consequently, the judgment is

final at this time for purposes of review in this Court under 28 U.S.C. §1257(2). Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 479 (1975); Mills v. Alabama, 384 U.S. 214, 217-18 (1966); Pope v. Atlantic Coast Line R. Co., 345 U.S. 379, 382 (1953).[10]

Moreover, this Court is not precluded from passing on DeLeo's First Amendment defenses in its exercise of certiorari review even if it finds that the Rhode Island Supreme Court's arbitrary interpretation of Rule 3(c) does not offend due process. Due process aside, the Rhode Island Supreme Court's interpretation of

---

10/ Even if this Court were to find a lack of finality with respect to the Rhode Island Supreme Court's determination on the abuse of process and malicious use of process claims, still it should accept review of the final judgment on the slander of title claim. If the Court does not do so, Nunes will obtain immediate execution. In these circumstances appellate review in this Court is proper. Radio Station WOW, Inc. v. Johnson, 326 U.S. 120, 126 (1945); Carondelet Canal and Navigation Company v. State of Louisiana, 233 U.S. 362, 372 (1914); Forgay v. Conrad, 161 U.S. 653, 655-56 (1897).

Rule 3(c) cannot possibly provide an adequate and independent state ground for its decision to ignore DeLeo's First Amendment defense of truth. DeLeo complied, in both substance and form in every real sense, with Rhode Island Supreme Court Rule 3(c) by making a timely appeal from the final judgment entered against him on appellees' slander of title counterclaims and by identifying his claims of error with specificity in his pre-briefing statement as required by Rhode Island Supreme Court Rule 16(h).[11] This being so, "a simple recitation that there has been no observance of [the] procedural rule" cannot thwart review of the deprivation of fundamental constitutional rights in this Court. N.A.A.C.P. v. Alabama, 377 U.S. 288, 297

11/ In determining whether a purported state ground is adequate and independent, this Court may undertake an "attentive examination" of the facts underlying it. Ancient Egyptian Order of Nobles, 279 U.S. at 746.

(1964); Staub v. City of Baxley, 355 U.S. 313, 318-20 (1958).

Furthermore, since the interpretation of Rhode Island Supreme Court Rule 3(c) invented for this case finds no support in prior Rhode Island case law and is entirely novel, it could not have been anticipated and complied with by DeLeo. It is therefore inadequate to preclude review of constitutional questions by this Court. See N.A.A.C.P. v. Alabama, 377 U.S. at 297; N.A.A.C.P. v. Alabama, 357 U.S. 449, 457-58 (1958); Brinkerhoff-Faris, 281 U.S. at 680-81; Wright v. Georgia, 373 U.S. 284, 291 (1963); see also Henry v. Mississippi, 379 U.S. 443, 448, n.3 (1965).

Given that the effect of its novel interpretation of Rule 3(c) has been the self-imposed abstention by the Rhode Island Supreme Court from addressing the merits of DeLeo's entire case on appeal, which was

dedicated to the public trust doctrine as a First Amendment defense, it is arguable that the Rhode Island Supreme Court has invoked its novel interpretation "in a spirit of evasion for the purpose of defeating the claim of federal right." Atlantic Coast Line R. Co. v. Mims, 242 U.S. 532, 535 (1917); Wolfe v. North Carolina, 364 U.S. 177, 195 (1960). Review in this Court should not be foreclosed in such circumstances. Moreover, the Rhode Island Supreme Court's unique invocation of the doctrine of collateral estoppel -- under which it asserted its inability to address DeLeo's public trust doctrine claims as a defense in any way (i.e., to address the reasonableness of his speech as a defense to the compensatory damage award and lack of actual malice as a defense to the punitive damage award) because the claims in the form of a complaint were dismissed by a lower court in the same case -- does not provide an

adequate and independent state law ground. Postal Telegraph Cable Company v. City of Newport, Kentucky, 247 U.S. 464, 475-76 (1918). See Section III.B. below.

Finally, it is no valid objection to this Court's jurisdiction to argue that, even if DeLeo's legal claims regarding the public's interest in appellees' lands were true, reasonable, and without actual malice, there was sufficient evidence in the record to support the jury verdict. Under Rhode Island law, an essential element of slander of title is a knowingly false statement. Hopkins v. Drowne, 41 A. 567, 568 (1898). If, then, DeLeo's legal claims concerning the public's interest in the land were not knowingly false, he cannot be liable for slander on the basis of these statements, no matter what evidence of motive can be

gleaned from the record.[12] Similarly, motive is irrelevant under the controlling precedents of this Court. See Section IV.A. below. See also United Mine Workers v.

12/ The Rhode Island Supreme Court did hold that a finding of malicious motive could be supported by the fact that DeLeo physically interfered with construction of the parcel, called police to the development, complained to the press, and objected to every step of the development process. App. A at 108a-118a; 546 A.2d at 1346-47. However, the only evidence of falsity cited by that court was DeLeo's claim to a personal interest in the triangular piece. Such evidence cannot provide an independent and adequate state law ground for the judgment. The Rhode Island Supreme Court never determined this claim to be false, knowingly or otherwise. In fact, it specifically declined to review the relevant Rhode Island case law addressing ownership of filled tidelands. But even assuming this claim were knowingly false, still it cannot provide an adequate and independent ground for the judgment. The jury verdict was general. It is impossible to determine whether it rested on the bulk of DeLeo's statements about the public trust or the isolated claim to a small piece of land whose commercial worthlessness is graphically demonstrated by the fact that appellees had it removed to provide landfill for other portions of the property. The judgment, resting as it does on a general verdict, is ambiguous and obscure, and the remote hypothetical possibility that it rested solely on DeLeo's personal claim cannot stand as a barrier to a determination by this Court of the validity of the judgment under the federal constitution. Michigan v. Long, 463 U.S. 1032, 1040-42 (1983); Minnesota v. National Tea Co., 309 U.S. 551, 557 (1940).

Pennington, 381 U.S. 657, 670 (1965). Accordingly, when a state court decision, as here, appears to violate federal law, is interwoven with questions of federal law, and "when the adequacy and independence of any possible state law ground is not clear from the face of the opinion," this Court has jurisdiction. Michigan v. Long, 463 U.S. 1032, 1040-41 (1983).

III. DUE PROCESS

A. The Application of Rhode Island Supreme Court Rule 3(c) to DeLeo In This Case to Preclude Him From a Determination of His First Amendment Defenses Violated His Due Process Rights.

While a state need not provide a system of appellate review as of right at all, if it does so, such a system must accord with due process. Evitts v. Lucey, 469 U.S. 387, 401 (1985). And in light of the fact that "due process requires that there be an opportunity to present every available defense," American Surety Co. v. Baldwin, 287 U.S 156, 168 (1932), a rule of appellate

procedure which can work to foreclose such defenses cannot pass muster under the due process clause unless it serves an important judicial interest and gives clear notice to the litigants. Thomas v. Arn, 474 U.S. 140, 155, (1985); see also Henry v. Mississippi, 379 U.S. 443, 448, n.3 (1965); Monger, 405 U.S. at 960.

Given these standards, the retroactive application of a novel, arbitrary and unforeseeable interpretation of a state procedural rule by a state supreme court to refuse consideration of a meritorious legal defense, not merely under state law but under federal constitutional law as well, violates due process in its primary sense -- a meaningful opportunity to be heard -- and mandates this Court's review of the federal constitutional question. Michel v. Louisiana, 350 U.S. 91, 93 (1985); Bouie v. Columbia, 378 U.S. 347, 354 (1964); Brinkerhoff-Faris 281 U.S. at 681; Central

Union Telephone Co. v. City of Edwardsville, 269 U.S. 190, 194-95 (1925); Hill, The Inadequate State Ground, 65 Columbia Law Rev. 943, 961 (1965).

The procedural trap sprung by the Rhode Island Supreme Court to deny DeLeo appellate review on a First Amendment defense under the guise of its Rule 3(c) is enunciated in a single terse sentence unsupported by any case law, App. A at 5a; 546 A.2d at 1345-46; and runs counter to the clear language of Rules 3(c) and 4. See N.A.A.C.P. v. Alabama, 377 U.S. at 297. It was novel and unanticipated, yet applied retroactively and uniquely to DeLeo. Compare, Thomas v. Arn, 474 U.S. at 144-45. Moreover, the Rhode Island Supreme Court's application of Rule 3(c) manifestly serves no legitimate state interest. The requirement that DeLeo must check a box on a standardized notice of appeal form labeled "Dismissal Merits" in order to raise a legal defense to the

judgment he is appealing, even though he is not appealing the dismissal of his complaint, is entirely irrational, especially in light of the particularized pre-briefing statement required by Rule 16(h). App. N at 125a. See Foman v. Davis, 371 U.S. 178, 181 (1962) (failure by appellant to indicate in notice of appeal all findings below objected to did not preclude him from raising findings not specifically indicated absent prejudice to appellee);[13]

13/ In Foman the Court specifically found an absence of prejudice where appellant had not only briefed the issue not specifically designated in the notice of appeal but had also listed it in his pre-briefing statement submitted to the appellee and the Court. 371 U.S. at 181. Here, too, DeLeo briefed the public trust doctrine and First Amendment issues on appeal to the Rhode Island Supreme Court and listed them in the pre-briefing statement submitted to the court and appellees as required by Rule 16(h). The decision in Foman v. Davis, although specifically addressed to the Federal Rules of Civil Procedure, has undeniable applicability to Rhode Island Supreme Court Rule 3(c). See Kent, Rhode Island Practice §73.5, n.49 (1969) (specifically embracing the rule of Foman v. Davis that the technical niceties of perfecting a notice of appeal

(Footnote Continued on Next Page)

B. The Rhode Island Supreme Court's Application of the Doctrine of Collateral Estoppel to Preclude DeLeo from Raising the Public Trust Doctrine as a Constitutional Defense Violated DeLeo's Due Process Rights.

Under Rhode Island law, "collateral estoppel makes conclusive in a subsequent action on a different claim the determination of particular issues actually litigated in a prior action as long as the issues are identical, the prior judgment was final and the individual who is the subject of the estoppel was a party or in privity with a party in the prior action." Cole v. Charron, 477 A.2d 959, 961 (R.I. 1984) (emphasis supplied). In the decision appealed from, however, the Rhode Island Supreme Court cited Cole v. Charron for the very different and entirely unprecedented

---

13/ (Footnote Continued From Previous Page)

under Rule 73(b) should not be employed to preclude substantial justice.) Rule 73(b) preceded and contains substantially the same language as current Supreme Court Rule 3(c).

proposition that "the 1982 unappealed [interlocutory] order of dismissal [of DeLeo's complaint by the trial court] also estops DeLeo from attempting to invoke the so-called public trust doctrine as a defense to the slander-of-title counterclaims filed by Nunes and Appleton." App. A at 5a-6a; 546 A.2d at 1345-46. In so holding, the Rhode Island Supreme Court has distorted the doctrine of collateral estoppel into an inequitable device for frustrating legitimate appellate constitutional review.

Counsel knows of no case in any American jurisdiction holding that the doctrine of collateral estoppel applies to arguably erroneous determinations of law made pursuant to an interlocutory order at the trial level which are then presented for correction on appeal to a higher court in the same case. Moreover, for collateral estoppel to apply, the prior and subsequent issues must be identical. The Rhode Island

Supreme Court ignored this well settled rule in holding that the trial judge's vacation of DeLeo's lis pendens filings, on the supposed ground that the public retained no interest in appellees' filled tidelands, "estops" DeLeo from presenting a defense to a slander of title judgment which would establish that his statements concerning the reach and application of the public trust doctrine -- a matter of vital public concern -- were, at the very least, reasonably and non-negligently made, and not knowingly or recklessly false.

This bizzare application of the doctrine of collateral estoppel, sprung upon DeLeo retroactively and without notice denies him the right to challenge the punitive damage component of the slander judgment because his arguments on a matter of public concern were not knowingly or recklessly false; Gertz, 418 U.S. at 349; and to challenge the compensatory damage

component because his arguments were made without fault (i.e., they were reasonable given the applicable public trust law). Id. at 347. In addition, DeLeo has been deprived of his right to defend his speech on the ground that it is protected petitioning activity. McDonald v. Smith, 472 U.S. at 485 (1985). See Section IV.A. below. He has also been deprived of his right to have a reviewing court independently scrutinize the entire record below in determining the validity of his First Amendment defenses. See Rankin v. McPherson, 107 S.Ct. 2891, 2897, n.9 (1987); Bose Corp. v. Consumers Union of U.S., Inc., 466 U.S. 485, 508, 510 (1984); Pennekamp v. Florida, 328 U.S. 331, 335 (1946). See Section III.C. below. This unprincipled judicial abstention cannot possibly comport with due process. Postal Telegraph Cable Co. v. City of Newport, Kentucky, 247 U.S. at 475-76 (1918) (state application of collateral estoppel in

contradiction to "universally accepted" estoppel principles violates due process).

C. The Holding of the Rhode Island Supreme Court that the Evidence Sufficiently Supported the Slander Judgment Without the Court's Having Conducted a Searching Review of the Record Offends Due Process

Despite its refusal to review the truth, reasonableness and lack of actual malice of DeLeo's explicitly raised and extensively briefed public trust doctrine claims, the Rhode Island Supreme Court inexplicably found, under Rhode Island law (which requires a finding of actual malice, defined as a knowing falsehood, to support a judgment for slander of title, Hopkins v. Drowne, 41 A. 567, 568 (1896)) that the record was "replete" with evidence which would sustain a finding of malice. App. A at 10a; 546 A.2d at 1346. Such a truncated judicial review, made without considering DeLeo's arguments of truth, reasonableness and lack of knowing or reckless falsity

squarely violates this Court's holding in Bose Corp. v. Consumers Union of U.S. Inc., 466 U.S. 485, 510, 511 (1984). Bose requires searching and independent appellate review as a requirement of federal constitutional law where the question at issue is one of alleged trespass across the lines between speech unconditionally guaranteed and speech which may legitimately be regulated.[14]

Applying the Bose standard of review, the judgment of the Rhode Island Supreme

---

14/ Any lingering doubt that the Court's holding in Bose should be limited to reviewing findings of actual malice in defamation cases has been dispelled by the Court's opinion in Rankin v. McPherson, 107 S.Ct. 2891, 2897, n.9 (1987). See also Don's Porta Signs, Inc. v. City of Clearwater, 99 L.Ed. 2d 491 (1988) (White, J., dissenting from denial of petition of writ of certiorori). And in any case, a finding of actual malice is constitutionally required to support the punitive damage award in this case involving speech on a matter of public conern, Gertz, 418 U.S. at 349, and is arguably required to support any judgment for petitioning activity, McDonald v. Smith, 472 U.S. at 490 (Brennan, J., concurring). See Section IV.A. below. Nor can it be credibly maintained that the standard of review established in Bose is not applicable to state courts. Bose, 466 U.S. at 499.

Court is multiply infirm. First, that court's determination that the record evidence could sustain the judgment without considering DeLeo's First Amendment defense of truth, reasonableness and lack of knowing or reckless falsity defies this Court's command in Bose that a reviewing tribunal may not decline to examine the full record in a slander case involving speech on a matter of public concern to determine whether that speech deserves First Amendment protection. Second, by rubber stamping the trial court's pretrial ruling of law which was based on dicta in a nineteenth century Rhode Island case, see Section IV.C. below, without a shred of independent inquiry and by arbitrarily awarding it unprecedented collateral estoppel effect, the Rhode Island Supreme Court has failed to discharge its constitutional duty to exercise independent judicial review on legal issues involving the applicability of First Amendment protection

to allegedly slanderous speech. See also Rankin v. McPherson, 107 S.Ct. 2891, 2897, n.9 (1987) (suggesting that Bose standard applies a fortiori to questions of law).

The Rhode Island Supreme Court thus failed to afford DeLeo the process due him under Bose by finding facts and making legal conclusions without reference to applicable First Amendment standards. Accordingly, this Court should undertake an independent review of the record. Cox v. Louisiana, 379 U.S. 536, 545, n.8 (1965); Norris v. Alabama, 294 U.S. 587, 590 (1935); Fiske v. Kansas, 274 U.S. 380, 385, 386 (1927). See also Time, Inc. v. Pape, 401 U.S. 279, 284 (1971); Monitor Patriot Co. v. Roy, 401 U.S. 265, 277 (1971); New York Times Co. v. Sullivan, 376 U.S. 254, 285 (1964).[15]

15/ DeLeo asks that this Court review only so much of the record as is necessary to make a traditionally legal determination -- whether his legal claims under the public

(Footnote Continued on Next Page)

IV. THE FIRST AMENDMENT

A. The Applicable Principles

Questions concerning the public's interest in land under the public trust doctrine are of paramount public concern, both nationally and under Rhode Island law. Illinois Central Railroad v. Illinois, 146 U.S. 387, 455 (1892) (ownership of public trust lands "is a subject of public concern") (emphasis supplied); Rhode Island

---

15/ (Footnote Continued From Previous Page)

trust doctrine were reasonable given his reliance on the then existing state of the law. In the usual defamation case, the propriety of factual statements, and not legal claims is at issue. In such cases, the existence of actual malice is aptly classified as a question of fact. See Harlow v. Fitzgerald, 457 U.S. 800, 816, n.27 (1982). Here, however, the propriety of the disputed public trust claim is determined by the reasonableness of the claim given the then existing law, Nagy v. McBurney, 392 A.2d 365, 368 (R.I. 1978), and is a question of law from the outset. Stewart v. Sonnenborn, 98 U.S. 187, 194 (1878). See Harlow v. Fitzgerald, 457 U.S. at 818 (reasonableness of legal interpretation to be determined by judge as question of law).

Constitution, Article I, Section 17 (guaranteeing to the people "the privileges of the shore"). Accordingly, DeLeo's petitioning efforts to vindicate the public interest in appellees' filled tidelands are precisely the kind of speech on matters of public concern that is at the heart of the First Amendment's protection. First National Bank of Boston v. Bellotti, 435 U.S. 765, 776 (1978); Dun & Bradstreet, Inc. v. Greenmoss Builders, 472 U.S. 749, 758, 759 (1985). Since DeLeo's statements concerning the public trust are true, Philadelphia Newpapers v. Hepps, 475 U.S. at 776-777 (1986), or at the very least were reasonable and non-negligent given the then existing body of law on the public trust doctrine, and thus made without fault[16],

---

16/ The Court's holding in Gertz, 418 U.S. at 347, that states may not "impose liability without fault" in cases involving matters of public concern made by private individuals has been interpreted by the

(Footnonte Continued on Next Page)

they are squarely protected under the First Amendment and cannot form the basis for a state law defamation judgment for

---

16/ (Footnote Continued From Previous Page)

Rhode Island Supreme Court and elsewhere to require at least a showing of negligence as to the truth or falsity of the statement. De Carvalho v. Da Silva, 414 A.2d 806, 812, 813 (R.I. 1980) Sunward Corp. v. Dun & Bradstreet, 811 F.2d 511, 527 n.14 (10th Cir. 1987); Lerman v. Flynt Distributing Co., Inc. 745 F.2d 123, 136 (2d Cir. 1984); Ollman v. Evans, 713 F.2d 838, 845 n.62 (D.C. Cir. 1983), rehearing en banc, 750 F.2d 970 (1984), cert. denied, 471 U.S. 1127 (1985); Littlefield v. Fort Dodge Messenger, 614 F.2d 581, 584, n.4 (8th Cir.), cert. denied, 445 U.S. 945 (1980); Carson v. Allied News Co., 529 F.2d 206, 214 (7th Cir. 1976); Restatement (Second) of Torts, §580B, Comment c, p. 223, Comment d, p. 225; §652E, Caveat and Commentary d, p. 398 (1976). See also Herbert v. Lando, 441 U.S. 153, 160 (1979); Time, Inc. v. Firestone, 424 U.S. 448, 464 (1976) (Powell J., concurring). Negligence is measured against the standard of conduct of a reasonable person under like circumstances. Restatement (Second) of Torts §580B, Comments g and h. And under Rhode Island law, whether a litigant is justified in making a legal claim is determined by its reasonableness in light of the applicable law. Nagy v. McBurney, 392 A.2d 365, 368. See also Welsh Mfg., Div. of Textron, Inc. v. Pinkerton's, Inc., 474 A.2d 436, 440 (R.I. 1984); Lawton v. Vadenais, 122 A.2d 138, 141 (R.I. 1956).

compensatory damages.[17] Gertz v. Robert Welch, Inc., 418 U.S. at 347; Dun & Bradstreet, Inc., 472 U.S. at 751.[18]

17/ While it is true that slander of title is an aspersion on one's property and defamation an aspersion on the person himself, Warren v. Bank of Marion, 618 F. Supp; 317, 320 (W.D. Va. 1985), it is not always easy to distinguish between the two actions because it might be possible to imply some accusation of personal inefficiency, incompetence or reprehensibility in nearly every imputation directed against title to property. W. Keeton, Prosser & Keaton on Torts §128 (5th Ed. 1984). Nor can the application of First Amendment protection to speech which slanders title be denied because such speech concerns commercial or economic matters or is in the economic interest of the speaker or the audience, especially where, as here, the speech in question furthers an important societal interest and "conveys information of potential interest and value to a diverse audience." Bigelow v. Virginia, 421 U.S. 809, 822 (1975); First National Bank of Boston v. Bellotti, 435 U.S. at 783; see also Dun & Bradstreet, Inc. v. Greenmoss Builders, 472 U.S. at 787-88 (Brennan, J., dissenting). It should also be noted that insofar as DeLeo's statements are merely legal opinions and not factual allegations, they are absolutely protected under the First Amendment. See Gertz v. Robert Welch, Inc., 418 U.S. at 339.

18/ The fact that DeLeo is an individual and not a newspaper publisher does not disqualify his statements from First Amendment protection under Gertz. See First National Bank of Boston, 435 U.S. at 778, 782; Dun & Bradstreet, 472 U.S. at 773 (White, J., concurring in the judgment); at 781 (Brennan, J., dissenting); Philadelphia Newspapers 475 U.S. at 779-80 (Brennan, J., concurring). While it is true

(Footnote Continued on Next Page)

Further, the burden should fall on appellees to prove such fault or negligence. Philadelphia Newspapers, 475 U.S. at 776, 779, 780 (Brennan, J., concurring).

Moreover, DeLeo cannot be liable in punitive damages for slander of title unless his statements made in protection of the public interest in appellees' filled tidelands under the public trust doctrine show, by clear and convincing evidence, actual malice -- knowledge of falsity or

---

18/ (Footnote Continued From Previous Page)

that DeLeo did not discuss Gertz in arguing that his speech was protected under the First Amendment before the Rhode Island Supreme Court until his petition for rehearing, this aspect of the case dealing with the legal ramifications of New York Times v. Sullivan and its progeny was presented to the trial court which specifically addressed it on several occasions. See p. 10, supra. Moreover, DeLeo did discuss McDonald v. Smith, 472 U.S. 479, 485 (1985), which, in the context of speech directed toward governmental bodies, similarly holds that more than mere falsehood is required by the First Amendment to sustain a defamation judgment. The Gertz argument is merely an enlargement of the argument made under McDonald v. Smith that DeLeo's

(Footnote Continued on Next Page)

reckless disregard for the truth.[19] Herbert v. Lando, 441 U.S. 153, 156 (1979); Gertz, 418 U.S. at 349. DeLeo's speech in vindication of the public trust is further protected under the First Amendment because it constituted petitioning activity before judicial, legislative and administrative bodies. McDonald v. Smith, 472 U.S. at

---

18/ (Footnote Continued From Previous Page)

speech is protected absent a showing that he should have known it to be false. See Illinois v. Gates, 462 U.S. 213, 248 (1983) (White, J., concurring); Stanley v. Illinois, 405 U.S. 645, 658, n. 10 (1972); Dewey v. Des Moines, 173 U.S. 193, 197, 198 (1899). Finally, the circumstances supporting a claim of waiver must be clear and compelling where First Amendment rights are at stake. Curtis Publishing Co. v. Butts, 388 U.S. 130, 145 (1967).

19/ It should be noted that appellee Nunes injected himself into this public trust controversy by advertising the development and sale of public trust lands. It is arguable, therefore, that he is a limited purpose public figure and that DeLeo cannot be liable for compensatory damages to Nunes without a showing by clear and convincing evidence of actual malice. Gertz, 418 U.S. at 351. Since, however, DeLeo's statements are so clearly reasonable given his reliance on the applicable public trust law, the Court need not determine whether appellee Nunes is a public figure.

484.[20]

B. The Rhode Island Supreme Court Applied a Strict Liability Standard in Reviewing the Slander of Title Judgment under Rhode Island Law, in Violation of DeLeo's First Amendment Rights

Under Rhode Island law, actual malice -- defined as knowing falsehood -- is an essential element of slander of title. Hopkins v. Drowne, 41 A. 567, 568 (1896). While the Rhode Island Supreme Court purported to apply this standard in reviewing the judgment, in actuality it applied a strict liability standard by refusing to

---

20/ DeLeo urges that this Court definitively interpret McDonald v. Smith for the proposition that a plaintiff must prove actual malice to recover in slander for expression falling within the scope of the Petition Clause, 472 U.S. at 490 (Brennan J., concurring); In re IBP Confidential Business Document Litigation, 800 F.2d 787, 789 (dissenting opinion) (8th Cir. 1986). Such an interpretation would accord with the broad privilege this Court has afforded petitioning activity in the antitrust field. See Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127 (1961); United Mine Workers of America v. Pennington,

(Footnote Continued on Next Page)

consider the truth, reasonableness or lack of knowing or reckless falsity of DeLeo's public trust arguments. This strict liability standard is plainly insufficient under the First Amendment to sustain a compensatory damage award for petitioning activities before governmental bodies and for statements on matters of public concern (see McDonald v. Smith, 472 U.S. at 484; Gertz v. Robert Welch, 418 U.S. at 345-347, 348-50) and, a fortiori, to sustain a punitive damage award for statements on a matter of public concern. Gertz, 418 U.S. at 349.

20/ (Footnote Continued From Previous Page)

381 U.S. 657 (1967); California Motor Transport Co. v. Trucking Unlimited, 404 U.S. 508 (1972). However, again, the Court need not decide this issue since DeLeo's statements concerning the public trust doctrine were so clearly reasonable in light of the applicable public trust law. Consequently, his petitioning activities are protected under either an actual malice standard or the reasonable, non-negligence standard which would otherwise apply to this speech on a matter of public concern. See In re IBP, 800 F.2d at 788.

C. DeLeo's Statements that the Public Retained an Interest in Appellees' Filled Tidelands Were True, Reasonable and Without Actual Malice and Are Therefore Protected Under the First Amendment

While the power of a state to part with property it holds in trust for the public to private persons is primarily a question of state law, Appleby v. City of New York, 271 U.S. 364, 380 (1926), such action is subject to review under federal law as "an abdication of sovereign governmental power" where the privatization amounts to "a gross perversion of the trust over the property." Id. at 394; Illinois Central Railroad v. Illinois, 146 U.S. 387, 452, 453. Rhode Island has allowed just such "a gross perversion of the trust" in filled tidelands on one of two theories. The public trust in such lands has either been impermissibly extinguished by judicial fiat as opposed to deliberate legislative action; or whatever unspecified legislative action has allegedly been taken to extinguish the public trust in

Rhode Island amounts to an impermissible privatization of all filled tidelands adjacent to harbors in the state.

Under the Constitutions of the United States and of the several sovereign states, sovereignty is vested in the people, Buckley v. Valeo, 424 U.S. 1, 14 (1976); Munn v. Illinois, 94 U.S. 113, 124 (1876); and it is the legislature which speaks for the sovereign people on questions of public welfare. Hawaii Housing Authority v. Midkiff, 467 U.S. 229, 240, 244 (1984). U.S. v. UAW-CIO, 352 U.S. 567, 593 (1957) (Douglas, J., dissenting). Thus, a state's determinations concerning the welfare and interest of the public fall within the legislative domain and are beyond the reach of judicial inquiry absent constitutional infirmity. Hawaii Housing Authority, 467 U.S. at 239, 240, 244; Berman v. Parker, 348 U.S. 26, 32 (1954); Louisville and Nashville Railroad Co. v. Kentucky, 161 U.S. 677, 701

(1896). State legislatures and not state judiciaries, must act as the primary fiduciary for public lands entrusted to the states. U.S. v. 1.58 Acres of Land, 523 F.Supp. 120, 123 (D. Mass. 1981); Opinion of the Justices, 383 Mass. 895, 902, 424 N.E.2d 1092, 1100-01 (1981); Marks v. Whitney, 491 P.2d 374, 381 (Cal. 1971); Kootenai Environ. Alliance v. Panhandle Yacht Club, 671 P.2d 1085, 1091 (Idaho 1983). See also State v. Village of Lake Delton, 286 N.W.2d 622, 629 (Wisc. App. 1979). "It is not for the courts to say how that trust shall be administered." Light v. U.S., 220 U.S. 523, 537 (1911); Opinion of the Justices, 383 Mass. 895, 902, 424 N.E.2d 1092, 1100-01 (1981); Note, "The Public Trust in Tidal Areas," 79 Yale Law Rev. 762, 786 (1970).

The Rhode Island Legislature has never, in its sovereign capacity, acted to extinguish the public trust interest in appellees' filled tidelands. Nor has it

ever said that the mere establishment of a harbor line gives an upland owner the right to fill out to the harbor line in a way which extinguishes all public right and access to the filled land. Any such pronouncements in the nineteenth century Rhode Island cases relied on by the Rhode Island courts in this case -- see e.g., Allen v. Allen, 19 R.I. 114, 32 A. 166 (1895) -- are, in addition to being dicta (see Jackvony v. Powell, 67 R.I. 218, 226, 21 A.2d 554, 557 (1941)), exclusively judicial and thus constitute, under federal law, an impermissible extinguishment of public rights through an "abdication of sovereign governmental power." The judiciary simply cannot undertake to speak for the legislature and the people as a whole in this area. Furthermore, if in fact the mere delineation of a harborline by the Rhode Island legislature did authorize, as a matter of legislative intent, upland owners

to fill out to the harborline and extinguish the public's rights to such filled lands, such action would be tantamount to privatizing all harbor lands in Rhode Island and would constitute precisely the kind of sweepingly impermissible abuse condemned in Illinois Central, 146 U.S. at 452 (calling into question privatization of all Chicago's harborlands).[21]

These precedents clearly demonstrate the eminent reasonableness, if not the truth, of DeLeo's claims that the public retains a valid interest under the public trust doctrine in appellees' filled tidelands. See, e.g., Nagy v. McBurney, 392 A.2d 365, 368 (R.I. 1978); Harlow v. Fitzgerald, 457 U.S. at 800, 815-19.

21/ In fact, the Rhode Island Supreme Court has never ruled that public trust rights are extinguished when tidelands are filled. It has only held that the establishment of a harborline is a license to the riparian landowner to fill out to the

(Footnote Continued on Next Page)

The reasonable and non-actionable nature of DeLeo's belief that the public retained an interest in appellees' filled tidelands is also underscored by the fact that the lower federal courts have interpreted Illinois Central to mean that public access to trust lands survives even where a proper legislative grant has been made. City of Alameda v. Todd Shipyards Corp.,

---

21/ (Footnote Continued From Previous Page)

harbor line. Engs v. Peckham, 11 R.I. 210, 224 (1875). The question of the landowner's interest in such filled land has been explicitly left open: "Whether the riparian proprietor who has filled out or wharfed out has as against the state the same absolute dominion over the wharf and new-made land as over his upland is a question we need not now deter- mine." Id. at 225. Language in Allen v. Allen, 19 R.I. 114, 115 (1895), which suggests that public rights are extinguished by filling out to the harborline, was specifically characterized as non- binding dictum in the later case of Jackvony v. Powell, 67 R.I. 218, 226, 21 A.2d 554, 557 (1941). And in Dawson v. Broome, 24 R.I. 359, 372 (1902), the Court ignored Allen v. Allen entirely and followed Engs v. Peckham, supra, in explicitly declining to determine the exact nature of a riparian owner's title to filled tidelands.

632 F. Supp. 333, 336 (1986); U.S. v. 1.58 Acres of Land, 523 F. Supp. 120, 124 (D. Mass. 1981). Courts have further interpreted Illinois Central to require that any legislative conveyance of public trust lands to private persons must be for a public purpose. E.g., Boston Waterfront Development Corp. v. Commonwealth, 378 Mass. 629, 647, 393 N.E. 2d 356, 365-66 (1979); National Audubon Society v. Superior Court of Alpine County, 658 P.2d 709, 722 (Cal.), cert. denied sub nom, Los Angeles Dept. of Water and Power v. National Audubon Soc., 464 U.S. 977 (1983); City of Berkeley v. Superior Court of Alameida County, 606 P.2d 362, 370 (Cal.), cert. denied sub nom, Santa Fe Land Improv. Co. v. Berkeley, 449 U.S. 840 (1980); Morse v. Oregon Division of State Lands, 590 P.2d 709, 711 (Or. 1979); Thomas v. Sanders, 413 N.E.2d 1224, 1231 (Ohio App. 1979); State of Vermont v. Central Vermont Railway, Inc., Chittendon

Super. Ct. No. 5966-84 CnC (Sept. 23, 1987); Kootenai Environ. Alliance v. Panhandle Yacht Club, 671 P.2d 1085, 1089 (Idaho 1983). Finally, even a sovereign grant is revocable when the public purpose supporting it is no longer served. Boston Waterfront Development Corp., 378 Mass. at 647, 649.

Given this abundant precedent, it is clear that DeLeo's statements[22] made in vindication of the public trust doctrine were, if not actually true, at the very least eminently reasonable, and that they cannot under the Constitution form the basis for either a compensatory or a punitive damage award against him on appellees' slander of title, malicious use of process and abuse of process counterclaims.

22/ There was ample evidence at trial indicating that DeLeo was thoroughly conversant with the applicable law on the public trust doctrine, had retained legal experts to advise him and relied on this knowledge in making his legal claims. Tr. V, 106-11, 114-17, 124-26, 133. See Nagy v. McBurney, 392 A.2d at 368 (probable cause for making legal claim exists where litigant believes in the validity of his claim in reliance upon the advice of counsel).

CONCLUSION

For the foregoing reasons, the decision of the Rhode Island Supreme Court should be summarily reversed, see Parrot v. City of Tallahassee, 381 U.S. 129 (1965) (reversing summarily where state's procedural ground for refusing to entertain appellate review was not adequate and independent); or, alternatively, the Court should note probable jurisdiction and set the case down for briefing and oral argument.

Respectfully submitted,

Kenneth Laurence*
Michael Halley
Thomas Frisardi
CHOATE, HALL & STEWART
53 State Street
Exchange Place
Boston, MA 02109
(617) 227-5020

Gerard McG. DeCelles
335 Thayer Street
Providence, RI 02906
(401) 421-7707

Attorneys for Appellants
Raymond DeLeo and
Anna A. DeLeo

* Counsel of Record